

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE KEITHLY, DONOVAN LEE, and)
EDITH ANNA CRAMER, individually and on)
Behalf of all Others Similarly Situated,)

Plaintiffs,)

v.)

INTELIUS, INC., A Delaware Corporation;)
and INTELIUS SALES, LLCS, A Nevada)
Limited Liability Company,)

Defendants.)

No. C09-1485RSL

PLAINTIFFS' SURREPLY TO STRIKE
THE SUPPLEMENTAL DECLARATION
OF RONALD V. THUNEN III

**NOTE ON MOTION CALENDAR:
March 8, 2010**

PLAINTIFFS' SURREPLY TO STRIKE THE
SUPPLEMENTAL DECLARATION OF RONALD THUNEN III
(09-CV-1485RSL)

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ARGUMENT

Pursuant to Local Rule CR 7(g), Plaintiffs submit this surreply to strike the Supplemental Declaration of Ronald V. Thunen III (“Thunen Supplemental Declaration”) in Support of Defendants’ Motion to Dismiss. (Dkt. No. 31.) As this District Court recognizes, “[a] party may file a surreply only ‘for requests to strike material contained in or attached to a reply brief[.]’” *Hutt v. Pierce County*, No. 09-5271BHS, 2009 WL 4066839, at *2 (W.D. Wash. Nov. 20, 2009). Furthermore, this District Court will strike exhibits attached to a reply that are not properly authenticated. *See, e.g., Khadera v. ABM Indus. Inc.*, No. 08-417RSM, 2010 WL 605308, at *5 (W.D. Wash. Feb 19, 2010) (striking a fax and a list of grievances where there was no evidence in the proffering party’s declaration that the documents were what they purported to be).

In the instant case, and contrary to Defendants’ suggestion that Plaintiffs do not dispute that Exhibits A and B were the offers presented to them in June 2008 and April 2009 (*see* Defs.’ Reply at 5), Plaintiffs clearly challenged the authenticity of the proffered web pages in their underlying Opposition to Defendant’s Request for Judicial Notice. Plaintiffs similarly argue here that the Thunen Supplemental Declaration fails to alleviate any of Plaintiffs’ prior concerns. Thus, the Thunen Supplemental Declaration suffers from the same procedural flaws that Plaintiffs identified in their original opposition and should therefore be stricken.

Specifically, and with respect to Exhibit A, Mr. Thunen once again states in conclusory fashion that “Intelius’ records of Lee/Cramer’s June 2008 transaction, maintained in the normal course of Intelius’ business, show that Lee/Cramer were presented with the enrollment form attached as Exhibit A.” (Thunen Supp. Dec., ¶ 6.) However, Mr. Thunen makes no specific attempt to explain *how* such data was acquired, nor *why* this Court can conclusively determine that the webpage is what it purports to be as it was represented to Plaintiffs Donavan Lee and Edith Cramer in 2008. As one federal district court has held in denying a request for judicial notice, “[a]bsent foundational information about how the Internet Archive is constituted, [the court] is not satisfied that this is a source whose accuracy cannot reasonably be questioned.”

1 *Canatla v. Van De Kamp*, No. 05-2415, 2005 WL 3481462, at *4 (N.D. Cal. 2005) (emphasis
 2 added). Complete foundational information is especially required where the information is no
 3 longer available to the public. *See Chapman v. San Francisco Newspaper Agency*, No. 01-2305,
 4 2002 WL 31119944, at *2 (N.D. Cal. 2002) (denying a request for judicial notice by holding that
 5 a “[r]easonable dispute could be raised concerning the accuracy of a single piece of data
 6 retrieved from a website, and no longer available, where no other source for the data exists”).
 7 Here, Mr. Thunen’s conclusory declaration simply fails to meet these standards.

8 Exhibit A deserves even closer scrutiny by the Court when comparing Mr. Thunen’s
 9 explanation with respect to Exhibits B and C. For instance, Mr. Thunen tellingly describes in
 10 some detail the process by which he was able to obtain information relating to Plaintiff Bruce
 11 Keithly’s activity on Intelius’ website. (*See* Thunen Supp. Dec., ¶ 12.) This begs the question
 12 why Mr. Thunen was not able to make similar descriptions or describe in any level of detail the
 13 process by which Exhibit A relating to Plaintiffs Lee and Cramer was regenerated, or consult
 14 with anyone who had such knowledge.

15 In addition, the authenticity of Exhibit A is placed further in doubt by an examination of
 16 how the webpage appeared a few months ago. As set forth in the Declaration of Karen B.
 17 Swope, there are material differences between the way the webpage appeared on January 20,
 18 2010, and how the webpage appeared to Plaintiffs Lee and Cramer when they made their
 19 transactions. (*See* Decl. of Swope, ¶ 4.) Specifically, there are notable discrepancies between
 20 how the “YES and show my report” and the “NO, show my report” buttons are presented to the
 21 consumer, as well as additional information contained in Exhibit A that shows how the webpage
 22 has changed over time. (*Id.*) This creates a genuine issue of material fact with respect to
 23 whether the webpages are what they purport to be; namely whether they are the ones that
 24 appeared to the public in June 2008. Under such circumstances, Plaintiffs have certainly
 25 demonstrated a reasonable argument as to the authenticity of such documents. *See Champan*,
 26 2002 WL 31119944, at *2 (“To prevail on the request for judicial notice of the ... website

1 printout, the defendant must demonstrate that there is no reasonable argument that the plaintiff
2 could make disputing its accuracy.”).

3 The submission of Exhibit C is even more suspect. As the Thunen Supplemental
4 Declaration makes clear, Exhibit C purports to be webpages “as they existed on April 7, 2009
5 and *would have been displayed* to Mr. Keithly, *had he elected* to purchase the identical
6 background check product for \$49.95.” (Thunen Supp. Decl., ¶ 8) (emphasis added). However,
7 Defendants fail to explain why this Court should take judicial notice of a printout of a website
8 that none of the named Plaintiffs actually visited. Indeed, Plaintiffs did not mention this
9 webpage in their complaint.

10 Plaintiffs do not generally dispute that courts are allowed to take judicial notice of facts
11 that not subject to dispute. Nor do Plaintiffs dispute that courts can examine documents upon
12 which a plaintiff’s complaint generally relies. However, these *specific* printouts are disputable.
13 They simply lack the foundational evidence required to conclusively determine that such
14 printouts may be judicially noticed. As this District Court recognizes, if a document’s
15 authenticity is in dispute, a court should not take judicial notice of such a document. *See Point*
16 *Ruston, L.L.C. v. Pac. Northwest Regional Council of United Broth. of Carpenters and Joiners of*
17 *America*, 658 F. Supp. 2d 1266, 1274 (W.D. Wash. 2009). Plaintiffs request that they be allowed
18 to conduct discovery, and obtain these disputed webpages in accordance with the Federal Rules
19 of Evidence and the discovery rules.

20 CONCLUSION

21 For the foregoing reasons, Plaintiffs respectfully request that the Court STRIKE the
22 Supplemental Declaration of Ronald V. Thunen III in Support of Defendants’ Motion to Dismiss
23 Plaintiffs’ Complaint.

24 DATED this 12th day of March, 2010.
25
26

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2010, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' SURREPLY TO STRIKE THE SUPPLEMENTAL DECLARATION OF RONALD THUNEN III** on the following recipients via the method indicated:

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DATED this 12th day of March, 2010.

s/Karin B. Swope
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